91-558

No. -

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In The

Supreme Court of the United States

October Term, 1991

THE COUNTY OF ALLEGANY, New York,

Petitioner,

vs.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; SAMUEL K. SKINNER, as Secretary of Transportation; and WILLIAM P. BARR, as Acting United States Attorney General,

Respondents,

STATE OF WASHINGTON, STATE OF NEVADA, and STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

PETITION OF THE COUNTY OF ALLEGANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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(17770)

QUESTIONS PRESENTED FOR REVIEW

1. Does the Commerce Clause, Article I, §8, cl. 3, empower the national government to compel the States to exercise their reserved sovereign powers to implement a federal policy?

2. Does the Guarantee Clause, Article IV, §4, restrict the national government from compelling the States to exercise their reserved sovereign powers to implement a federal policy?

PARTIES

The parties to the proceeding below were:

1. The State of New York, Plaintiff;

2. The County of Allegany, New York, Plaintiff;

3. The County of Cortland, New York, Plaintiff;

4. The United States of America, Defendant;

5. James D. Watkins, as Secretary of Energy, Defendant;

6. Kenneth M. Carr, as Chairman of the United States Nuclear Regulatory Commission, Defendant;

7. Samuel K. Skinner, as Secretary of Transportation, Defendant;

8. William P. Barr, as Acting United States Attorney General, Defendant;[1]

9. The State of Washington, Intervenor;

10. The State of Nevada, Intervenor; and

11. The State of South Carolina, Intervenor.

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[1] In the proceedings below, Richard Thornburgh was named as a defendant in his capacity as United States Attorney General. Mr. Barr, who is currently Acting United States Attorney General, has been substituted pursuant to Supreme Court Rule 35.3.

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TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (reproduced at Appendix A-1) (hereinafter "A."), issued on August 8, 1991, is reported at __F.2d__ (2d Cir. 1991) (Westlaw 1991 WL 150660).

The opinion of the United States District Court for the Northern District of New York (reproduced at A. 17) is reported at 757 F. Supp. 10 (N.D.N.Y. 1990).

JURISDICTION

The judgment of the Court of Appeals was dated and entered on August 8, 1991. (A. 1). Jurisdiction to review the judgment of the Court of Appeals is conferred to this Court by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The following constitutional provisions, statutes and regulations are involved in this Petition.

The Commerce Clause, United States Constitution, Article I §8, cl. 3, which provides:

> The Congress shall have the Power ...
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> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Guarantee Clause of the United States Constitution, Article IV, §4, which provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect

each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

The Tenth Amendment to the United States Constitution which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Low-Level Radioactive Waste Policy Amendments Act of 1985 which provides in relevant parts:

> (a)(1) Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of —
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> (A) low-level radioactive waste generated within the State (other than by the Federal Government) that consists of or contains class A, B, or C radioactive waste as defined by section 61.55 of title 10, Code of Federal Regulations, as in effect on January 26, 1983;
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> (B) low-level radioactive waste described in subparagraph (A) that is generated by the Federal Government except such waste that is —
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> (i) owned or generated by the Department of Energy;
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> (ii) owned or generated by the United States Navy as a result of the decommissioning of vessels of the United States Navy; or
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> (iii) owned or generated as a result of any research, development, testing, or production of any atomic weapon; and
>
> (C) low-level radioactive waste described in subparagraphs (A) and (B) that is generated outside of the State and accepted for disposal in accordance with sections 2021e or 2021f of this title.

42 U.S.C. §2021c(a)(1).

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> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

42 U.S.C. §2021e(d)(2)(C).

STATEMENT OF THE CASE

Introduction

This case presents two related issues of fundamental importance to the structure of the federal system of the United States which have never been reviewed by this Court.

The first issue is whether the national government is empowered by the Commerce Clause to compel the States to exercise their reserved sovereign powers to carry out a federal policy. The Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §2021b *et seq.* (the "Act") mandates that each State is "responsible" for the disposal of low-level radioactive waste generated within the State. While the States have three options as to how to carry out this responsibility, each option requires action by State officials and/or expenditure of State funds. The Court of Appeals held that the Act's mandate was within the power of Congress pursuant to the Commerce Clause and that the federal courts essentially have no role in preserving State sovereignty in the federal system.

Second, this action presents for the first time the issue of the applicability of the Guarantee Clause, Article IV, §4 to a Congressional mandate pursuant to the Commerce Clause. The Act requires the officials of each State to comply with a mandate by the national government regardless of the wishes of the people of each State. The Act's mandate violates the guarantee of a Republican Form of Government for the States contained in the United States Constitution. The Court of Appeals implicitly held, however, that the Guarantee Clause did not provide any protection of State sovereignty.

These two issues go to the essence of the relationship between the States, the people of the States and the national government. The resolution of these issues will determine whether the States will remain sovereign governments answerable to the people of each State. The use by the national government of schemes comprised of mandates and sanctions threatens to relegate the States to the status of mere departments of an all encompassing national government. These fundamental issues affecting the basic structure of the Nation should be settled by this Court.

How The Case Arose

The Act provides that each State is "responsible" for disposal of low-level radioactive waste generated in the State. 42 U.S.C. §2021c(a)(1). A State's responsibility is not conditioned on any actions by the State, and there is nothing the State can do to avoid this responsibility.

The States can meet their responsibility in only three ways. A State can either (a) alone, or with other States in a compact, develop a low-level radioactive waste disposal facility (42 U.S.C. §§2021c and 2021d); or, (b) take title and possession of the low-level radioactive waste generated in the State (42 U.S.C. §2021e[d][2][C]); or, (c) become liable to the generators of such

waste for all damages caused by the failure of the State to take title and possession of the waste. (42 U.S.C. §2021e[d][2][C]). Under any of these options, the State is required to exercise its sovereign powers to meet a federally mandated obligation. The Respondents have previously argued that such a mandate is authorized by the Commerce Clause of the United States Constitution, Article I, §8, cl. 3.

In response to the mandatory provisions of the Act, the State of New York has enacted various laws and formed a commission to find a site for a low-level radioactive waste disposal facility. The State action in this regard has been the result of the coercive nature of the Act. (A. 37-40) (Affidavit of Clarence D. Rappleyea, Jr., sworn to on September 5, 1990, ¶¶6-13). In September, 1989, the New York State Low-Level Radioactive Waste Disposal Siting Commission (the "Commission") designated three potential sites of approximately one mile square in size for a low-level radioactive waste disposal site in the Allegany County Towns of Caneadea, West Almond and Allen. (A. 29, 30) (Affidavit of Delores Cross, sworn to on September 5, 1990, ["Cross Aff."], ¶4). These three sites were selected from a candidate area previously identified by the Commission. *Id.*

Thereafter, the Board of Legislators of the County of Allegany enacted various resolutions opposing the selection of the County as a potential location for a low-level radioactive waste disposal facility and indicated the County's "irrevocable" opposition to the disposal facility. (A. 30) (Cross Aff. ¶5).

Nevertheless, the County has been forced by the terms of the Act and resulting actions by the State of New York to act as "agents" to carry out the policy of the Act. The Sheriff for Allegany County has been forced to serve civil process and to accompany members of the Commission staff on various attempted visits to potential sites. Allegany County facilities such as the county jail, county courthouse and other buildings have been

used for the purpose of holding citizens who have been charged with impeding the actions of the Commission. The Allegany County District Attorney and his staff have been forced to become involved in criminal prosecutions of citizens who allegedly illegally impeded the siting process. At various times the State of New York has indicated that the County may have to invoke the "mutual aid" system of police protection. When such "mutual aid" is requested, the County becomes financially liable for the services provided. Innumerable hours have been spent by County officials in setting up procedures to attempt to avoid violence during the siting process. (A. 31) (Cross Aff. ¶¶8, 9).

All these actions and expenditures of funds have been occasioned by the Act and the resulting State government reaction and are against the wishes of the citizens of Allegany County. The various officials of Allegany County, against their will and against the will of their constituents, have been forced to carry out the Congressional mandate with respect to low-level radioactive waste. (A. 31) (Cross Aff. ¶10).

Proceedings Below

This action was brought by the State of New York, the County of Allegany and the County of Cortland to obtain a declaratory judgment that the Act is null and void as violative of the United States Constitution. The federal defendants moved to dismiss the action for failure to state a claim. Thereafter, the District Court permitted a number of private generators of low-level radioactive waste to appear as an *amicus curiae* in this action.

Subsequently, the States of Washington, Nevada and South Carolina intervened as parties in this action and appeared in support of the constitutionality of the Act. These three States constitute the only States in the Union that currently have operating commercial low-level radioactive waste disposal sites. The intervenors thereafter also moved to dismiss the action.

The plaintiffs opposed both motions to dismiss. The State of New York and the County of Allegany also made a cross-motion for summary judgment. The defendants and the interveners also moved for summary judgment.

On December 7, 1990, the District Court heard oral argument on all motions and issued its decision. The District Court ruled that *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), was dispositive of the case and barred any judicial intervention to declare the Act unconstitutional. (A. 21). The District Court granted the defendants' and interveners' motion to dismiss the action, and judgment was thereafter entered on December 26, 1990. (A. 26, 27). On January 30, 1991, the State of New York, the County of Allegany, and the County of Cortland filed timely notices of appeal. The appeals were consolidated for hearing and determination by the Court of Appeals.

The appeals were argued before the United States Court of Appeals for the Second Circuit on May 21, 1991. On August 8, 1991, the Court of Appeals affirmed the decision of the District Court. The Court of Appeals agreed with the District Court that *Garcia* was dispositive and barred any judicial intervention. (A. 11, 15).

Basis For Federal Jurisdiction Of The District Court

The District Court had jurisdiction of this action under 28 U.S.C. §1331, 28 U.S.C. §1337, 28 U.S.C. §1346, and 28 U.S.C. §2201.

REASONS FOR GRANTING THE PETITION

A. THE NATIONAL GOVERNMENT IS NOT EMPOWERED TO ORDER THE STATES TO EXERCISE THEIR RESERVED SOVEREIGN POWERS.

The key issue in this action is whether the national government pursuant to the Commerce Clause is empowered to order the States to exercise their sovereign powers to carry out a federal policy. The ability to issue such orders would render the States, their officials and their treasuries subject to the whim of the national government. No longer independent and autonomous components of a federal system, States would become mere departments of the national government. This is an issue of fundamental importance to the structure of the Nation which has never been reviewed by this Court.

This Court has recently confirmed the separate and independent existence of the States within the federal system.

> As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle. In *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990), "[w]e beg[a]n with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." Over a hundred years ago, the Court described the constitutional scheme of dual sovereigns:
>
> " '[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence, ... '[W]ithout the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States,

> and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869), quoting *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L.Ed. 101 (1869).
>
> The Constitution created a Federal Government of limited powers. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. The States thus retain subtantial sovereign authority under our constitutional system.

Gregory v. Ashcroft, 111 S. Ct. 2395, 2399 (1991).

This Court has also noted the vital importance of this federal structure to the welfare of the people.

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. *See generally* McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987); Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3-10 (1988).

Id.

Schemes authorizing legislation similar to the Act were considered, and rejected, in the formation of the Constitution. As Justice O'Connor showed by an analysis of notes of the Constitutional Convention in her dissenting opinion in *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 791-796

(1982), the Founders rejected the notion that the national government could commandeer the machinery of the States' governments to carry out its policy decisions. The Convention settled on a federal system whereby the national government had the power to enact legislation that could operate upon the people directly. *Id.* Federal policy would not depend upon cooperation of the State legislatures, as under the Articles of Confederation. *Id.* The Convention also rejected a proposal authorizing the national government to use "force" to compel a State to fulfill its duty and a proposal giving the national legislature veto power over State laws. *Id.*

> Under the Articles of Confederation, the National Legislature operated through the States. The Framers could have fortified the central government, while still maintaining the same system, if they had increased Congress' power to demand obedience from state legislatures. In time, this scheme might have relegated the States to mere departments of the National Government, a status the Court appears to endorse today. The Framers, however, eschewed this course, choosing instead to allow Congress to pass laws directly affecting individuals, and rejecting proposals that would have given Congress military or legislative power over state governments. In this way, the Framers established independent state and national sovereigns. The National Government received the power to enact its own laws and to enforce those laws over conflicting state legislation. The States retained the power to govern as sovereigns in fields that Congress cannot or will not pre-empt. This product of the Constitutional Convention, I believe, is fundamentally inconsistent with a system in which either Congress or a state legislature harnesses the legislative powers of the other sovereign.

Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 795-96 (1982) (footnotes omitted).

The majority rejected Justice O'Connor's position that the act in question was unconstitutional on the ground that the act did not mandate an "imposition of general affirmative obligations".

Id. at 769 n. 32. The majority did not voice any disagreement with Justice O'Connor's historical analysis.

Two provisions of the Constitution confirm the existence of the States as separate sovereign governments. The Guarantee Clause of the Constitution, Article IV, §4, provides: "The United States shall guarantee to every State in this Union a Republican Form of Government ...." The Tenth Amendment to the Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The combined import of these two provisions is that the States are to be separate sovereign governments, with general powers, answerable not to the national government but to the people of the States.

While recent decisions of this Court have rejected Tenth Amendment claims by States attacking Congressional legislation, none of these recent decisions have addressed the issue of a direct Congressional mandate to the States to exercise their sovereign powers to carry out a federal policy. These decisions have involved either regulation of State activity which affects interstate commerce or federal tax collection (*e.g., Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 [1985]; *Maryland v. Wirtz*, 392 U.S. 183 [1968]; *South Carolina v. Baker*, 485 U.S. 505 [1988] [taxes]; *Fry v. United States*, 421 U.S. 542 [1975]); the setting of conditions for state involvement in a federally preemptable field (*e.g., Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 [1982]); or the conditional grant of funds to the States (*e.g., South Dakota v. Adams*, 506 F. Supp. 50 [D.S.D.], *aff'd*, 635 F.2d 698 [8th Cir. 1980], *cert. denied*, 451 U.S. 984 [1981]; *Nevada v. Skinner*, 884 F.2d 445 [9th Cir. 1989], *cert. denied*, 110 S. Ct. 1112 [1990]).

Although it has never decided the constitutionality of a direct Congressional mandate to the States, this Court once granted a petition to review mandates to the States by an agency of the na-

tional government. *See Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977). This petition involved decisions by three different United States Courts of Appeals holding that a mandate by the national government to the States either to establish programs to carry out a federal policy or else suffer sanctions was not authorized by the Commerce Clause and would violate the plan of federalism set forth in the United States Constitution.

Those three cases, *Maryland v. Environmental Protection Agency*, 530 F.2d 215 (4th Cir. 1975), *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), and *Brown v. Environmental Protection Agency*, 521 F.2d 827 (9th Cir. 1975), dealt with attempts by the national government to implement the Clean Air Act. Pursuant to the Clean Air Act, if an area of a State fails to achieve compliance with air quality standards, the national government may step in and implement its own plan. *Maryland v. Environmental Protection Agency*, 530 F.2d 215, 219 (4th Cir. 1975). In each of the cases, the States failed in their attempts to achieve air quality standards, and the EPA attempted to implement its "plan" by ordering the States[1] governments to take certain actions.

The three Courts of Appeals found that these "orders" raised constitutional concerns and, therefore, interpreted the Clean Air Act as not authorizing such orders. *Maryland v. Environmental Protection Agency*, 530 F.2d 215, 225-28 (4th Cir. 1975); *District of Columbia v. Train*, 521 F.2d 971, 994 (D.C. Cir. 1975); *Brown v. Environmental Protection Agency*, 521 F.2d 827, 837-42 (9th Cir. 1975). While the national government could permissibly bring in its own personnel and establish a program, it could not seize the machinery of the State to carry out a federal action. The United States Court of Appeals for the Fourth Circuit noted:

> And, while it may be true that some, or even many, of the attributes of state sovereignty have been diminished by the exercise by Congress of the broad rights accorded the nation

under the commerce clause, it is equally true that if there is any attribute of sovereignty left to the states it is the right of their legislatures to pass, or not to pass, laws. As the Court stated in *In re Duncan*, 139 U.S. 449, 11 S.Ct. 573, 35 L.Ed. 219 (1891):

> "By the constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies ...." 139 U.S. 449, 461, 11 S.Ct. 573, 577, 35 L.Ed. 219.

Not far afield is the rejection by the Philadelphia Convention of Charles Pinkney's constitutional plan which would have enabled Congress to "revise," "negative," or "annul" the laws of a state. See *Elliot's Debates* (Michie Ed., Vol. I, Book I, pp. 149, 400-01).

> If the national legislature may not revise, negative or annul a law of a state legislature, how an Act of Congress may be construed to permit an agency of the United Staes to direct a state legislature to legislate is difficult to understand.

Maryland v. Environmental Protection Agency, 530 F.2d 215, 225 (4th Cir. 1975). *Accord District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975); *Brown v. Environmental Protection Agency*, 521 F.2d 827 (9th Cir. 1975).[2]

This Court granted certiorari in all three EPA cases but vacated and remanded them for consideration of mootness when the EPA rescinded the objectionable regulations. *Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977) (per curiam).

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[2] *Contra Pennsylvania v. Environmental Protection Agency*, 500 F.2d 246 (3d Cir. 1974).

On its face the Act ignores the sovereign character of the States and adopts a scheme for implementing federal policy which was rejected by the Constitutional Convention. In reviewing the Act, however, the Court of Appeals bypassed the analysis that guided the three courts in the EPA cases. Instead, it held that under *Garcia* and its progeny, absent a defect in the political process or an unequal treatment of a State, the federal courts have no role in protecting any aspect of the sovereignty of the States in the federal system.

No decision of this Court has ever gone so far in limiting the role of the federal courts. It is the well-established role of the federal courts "to say what the law is." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803). This Court has steadfastly maintained in its decisions on Tenth Amendment claims that it has ample power to prevent "the utter destruction of the State as a sovereign political entity." *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968); *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 556 (1985); *South Carolina v. Baker*, 485 U.S. 505, 528 (1988) (Scalia, J., concurring).

This Court has never disavowed a role in protecting States from direct Congressional mandates. In rejecting a number of recent Tenth Amendment challenges to various congressional acts, this Court has been careful to note that the statutes under review did not "authorize the imposition of general affirmative obligations on the State." *See, e.g., Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 769 n.32 (1982); *South Carolina v. Baker*, 485 U.S. 505, 514 (1988) ("[t]hat a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect"); *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 288 (1981) (Congressional act held constitutional when there was "no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program").

This bright line has now been crossed. The issue raised by the EPA cases, but later dismissed as moot, is now presented to this Court again for review.

The Court of Appeals, in upholding the Act, has failed to consider the States' role as separate sovereign entities within the federal system. If the States can be subjected to mandates by the national government to use their officials and funds to implement federal policies, then they are less than sovereign entities, and in a real sense, mere agents or departments of an all-encompassing national government. This result would undermine the vital role of the States in the federal system so recently reaffirmed by this Court in *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991). It is respectfully submitted that the threat to the sovereign character of the States represented by the Act should be reviewed by this Court.

B. THE ACT VIOLATES THE GUARANTEE OF A "REPUBLICAN FORM OF GOVERNMENT".

This action raises for the first time in this Court the issue of whether the Guarantee Clause, Article IV, §4, imposes limitations on federal action pursuant to the Commerce Clause affecting the States.

This Court has recently recognized the Guarantee Clause as confirming the power of the people of the States to determine the qualifications of their most important elected officials.

> These cases stand in recognition of the authority of the people of the States to determine the qualifications of their most important government officials. It is an authority that lies at " 'the heart of representative government.' " *Ibid.* It

> is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government." U.S. Const., Art. IV, §4. *See Sugarman, supra*, 413 U.S., at 648, 93 S. Ct., at 2850-2851 (citing the Guarantee Clause and the Tenth Amendment). See also Merritt, 88 Colum. L.Rev., at 50-55.
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> ****
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> As against Congress' powers "[t]o regulate Commerce ... among the several States," U.S. Const., Art. I, §8, cl. 3, the authority of the people of the States to determine the qualifications of their government officials may be inviolate.

Gregory v. Ashcroft, 111 S. Ct. 2395, 2402-03 (1991) (footnote omitted).

A holding by this Court that the right of the people of the States to select their own government officials is "inviolate" pursuant to the Guarantee Clause would be of little value, however, if the national government is entitled to compel actions by such officials despite the contrary voices of the people of the States. This result would render the constitutional guarantee of a "Republican Form of Government" solely a matter of form with no substance.

In an insightful article on the role of the Guarantee Clause in protecting State sovereignty, Professor Deborah Jones Merritt of the University of Illinois College of Law has shown that mandates by the national government to State governments to exercise their sovereign powers would violate the Guarantee Clause.

> In a republican government, all power derives from the voters. The citizens of a republican state decide when to exercise their legislative or executive power and how to wield that authority. If the federal government forces the states to adopt a statute, it destroys this relationship between state voters and their representatives; state legislators become ac-

> countable to Congress, rather than to their constituents. Similarly, if the national government compels the states to enforce federal regulatory programs, state budgets and executive resources reflect federal priorities rather than the wishes of local citizens. These results are antithetical to the popular control exerted in a republican form of government.
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> Directives that the states consider, adopt, or enforce federal programs, moreover, permit federal officials to escape responsibility for their own initiatives. Congress may conserve federal resources and avoid unpopular tax increases by compelling state governments to evaluate or administer costly national programs. If a necessary program threatens to generate controversy, Congress can avoid the voters' ire by forcing state legislatures to adopt the measure. The citizens of each state, assuming that their local officials are responsible for the unwanted enactment, will retaliate against those officials. Such confusion over the lines of political responsibility is unacceptable in a republican government; in order to fulfill the ideal of popular control, the citizens must know which officials are responsible for unpopular legislation.

Merritt, "The Guarantee Clause and State Autonomy: Federalism for a Third Century" 88 Colum. L. Rev. 1, 61-62 (1988) (footnotes omitted). *See also* L. Tribe, *American Constitutional Law* §5-23 (2d ed. 1988); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 789-91 (1982) (O'Connor, J., dissenting).

The Act represents an unprecedented invasion of State sovereignty by the national government. The mandatory nature of the Act and its sanctions undermine the separate character of the sovereign States and deny to the people of the States the right to determine the course of their own governments. New York and its political subdivisions have been forced against the will of their constituents to exercise their sovereign powers to carry out the

policies of the Act. *See* A. 29-32 (Cross Aff. ¶¶ 3-11). As shown by Justice O'Connor in her dissenting opinion in *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982), and the Fourth Circuit in *Maryland v. Environmental Protection Agency*, 530 F.2d 215 (4th Cir. 1975), however, the notion that national government could use the States' governments to carry out federal policy decisions was rejected by the Constitutional Convention.

The Act's implicit repudiation of a basic guarantee of our Constitution is a matter that merits review by this Court.

CONCLUSION

As this Court has recently observed, our Constitution establishes a system of dual sovereignty including both the States and the national government. The Act, however, is destructive of an essential attribute of State sovereignty — the right of the States and their citizens to decide when and how to exercise the States' sovereign powers. By mandating that each State will be responsible for the disposal of low-level radioactive wastes generated within the State, the national government treats the States as its mere agents or departments.

The decision of the Court of Appeals goes far beyond any prior decision of this Court by allowing the national government to ignore the essential sovereignty of the States and by denying the federal courts any role in protecting such sovereignty. Such an important departure from this Court's prior decisions and the

basic framework of the Constitution should be reviewed by this Court. It is respectfully urged, therefore, that the Court grant the Petition and set the case for argument.

Dated: October 3, 1991

Respectfully submitted,

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